Petition

81-640

No.

Office - Supreme Court, U.S.
FILED
OCT 8 1981
ALEXANDER L. STEVAS
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MERTON B. BERGER, M.D.,

Petitioner,

vs.

NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SIDNEY F. WHEELER
Attorney for Petitioner

Of Counsel:

LONG, WEINBERG, ANSLEY & WHEELER
2500 The Equitable Building
100 Peachtree Street, N.W.
Atlanta, Georgia 30303
(404) 688-7900

QUESTIONS PRESENTED

1. Can a Physician Be Sued for Malpractice by the Insurance Carrier of His Patient When the Doctor Gratuitously Completes an Insurance Claim Form Stating a Diagnosis and the Insurance Company, But not the Patient, Feels the Diagnosis Was Incorrect?

2. In the Absence of Authoritative State Law, Did the Court of Appeals for the Fifth Circuit Err In Refusing to Certify the Within Matter to the Supreme Court of the State of Georgia?

3. As a Matter of Policy, Should a Physician be Amenable to a Suit by a Patient's Insuror in the Absence of Any Relationship Between the Doctor and Insurance Company?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals, rendered on June 18, 1981, is not yet published; it is reprinted in Appendix A, *infra*, at page 1(a). The refusal of the Court of Appeals to grant an en banc rehearing or to certify the within matter to the Supreme Court of Georgia is likewise not published; it is reprinted herein in Appendix B, *infra*, at page 1(b). The June 25, 1979, opinion of the District Court for the Northern District of Georgia granting petitioner's original motion for summary judgment is

not reported, but is attached herein as Appendix C, *infra*, on page 1(c). The August 18, 1979, denial of respondent's motion for reconsideration of the grant of summary judgment is also unpublished and is attached hereto as Appendix D, *infra*, at page 1(d). A newspaper article quoting opposing counsel's opinion as to the unique importance of the decision herein is reproduced as Appendix E, *infra*, at page 1(e).

JURISDICTION

The judgment of the Court of Appeals, which is reprinted in Appendix A, *infra*, at page 1(a), was entered on June 18, 1981. Petitioner filed a petition for rehearing en banc in the Court of Appeals for the Fifth Circuit. This petition was denied by an order filed August 10, 1981, said order being reprinted in Appendix B hereto, *infra*, at page 1(b). Subsequently, the petition to stay mandate was granted on September 3, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The following Georgia statutes and Supreme Court Rules are relevant to the questions presented by this petition:

> "MALPRACTICE OF SURGERY AND MEDICINE: A person professing to practice surgery or the administering of medicine for compensation must bring to the exercise of his profession a reasonable degree of care and skill. Any injury resulting from a want of such care and skill shall be a tort for which recovery may be had." (Ga. Laws, 1933, p. 2013; Ga. Code Ann. § 84-924).
>
> "SUPREME COURT AUTHORIZED TO RECEIVE AND ANSWER CERTIFICATES AS TO STATE LAW FROM FEDERAL APPELLATE COURTS: The Supreme Court of this State may, by rule of Court, provide that, when it shall appear to the Supreme Court of the United States, to any Circuit Court of Appeals of the United

States, or to the Court of Appeals or the District of Columbia that there are involved in any proceeding before it questions or propositions of the laws of this State, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the Supreme Court of this State, such Federal Appellate Court may certify such questions or propositions of the laws of this State to the Supreme Court of this State for instructions concerning such questions or propositions of State law, which certificate the Supreme Court of this State, by written opinion, may answer: Provided, however, that the Court of Appeals shall not have jurisdiction to consider any questions certified under this section by transfer or otherwise. (Georgia Laws, 1977, pp. 577, 578; Ga. Code Ann. § 24-3902).

"ACTION FOR MEDICAL MALPRACTICE" defined: As used in this section, the term 'action for medical malpractice' means any claim for damages resulting from the death or injury to any person arising out of (a) health, medical, dental, or surgical: (1) service, (2) diagnosis, (3) prescription, (4) treatment, or (5) care, rendered by a person authorized by law to perform such service or by any person acting under the supervision and control of such lawfully authorized person, or (b) care or service rendered by any public or private hospital, nursing home, clinic, hospital authority, facility or institution, or by any officer, agent or employee thereof acting within the scope of his or her employment. (Ga. Laws, 1976, pp. 1363-1364; Ga. Code Ann. § 3-1101.)

"GENERAL LIMITATIONS": Except as otherwise provided in this Chapter, an action for medical malpractice shall be brought within two years after the date on which the negligent or wrongful act or omission occurred. (Ga. Laws 1976, pp. 1363, 1364; Ga. Code Ann. § 3-1102.)

"Rule 36, Supreme Court of Georgia"

VI. FEDERAL APPELLATE COURTS

Rule 36.

(a) Certified Questions.

When it shall appear to the Supreme Court of the United States, to any Circuit Court of Appeals of the

United States, or to the Court of Appeals of the District of Columbia that there are involved in any proceeding before it questions or propositions of the laws of this State which are determinative of said cause and there are no clear controlling precedents in the appellate court decisions of this State, such federal appellate court may certify such questions or propositions of the laws of Georgia to this court for instructions concerning such questions or propositions.

(b) Formulation of Questions, Records, etc.

The court certifying to this court a question of law shall formulate the question and cause the question to be certified and transmitted to this court, together with copies of such parts of the record and briefs in the case as the certifying court deems relevant.

(c) Docketing, etc., of Questions.

Such questions shall be docketed by the Clerk as are other cases and the rules relating to oral arguments, briefs, motions, etc., in direct appeals shall apply.

(d) Costs.

The costs in such proceeding shall be equally divided between the parties unless otherwise ordered by this court.

Rule 37.

(Reserved)

(published at 242 Ga. 1007, 1008 (1978))

STATEMENT OF THE CASE

At all times relevant hereto petitioner Merton B. Berger was a physician specializing in the practice of psychiatry in the metropolitan Atlanta area. During the course of his practice, he

had occasion to serve as a psychiatric consultant to a number of private and governmental entities, including the Federal Aviation Administration.

During the late 1960's and early 1970's the Atlanta area experienced phenomenal growth; this growth included Atlanta's Hartsfield Airport. Over those same years Dr. Berger was consulted by a number of individuals employed as air traffic controllers; some of these air traffic controllers had obtained policies of disability income insurance from various insurance companies, including North American Company for Life and Health Insurance [hereinafter, North American]. From time to time, Dr. Berger diagnosed certain of these individuals as suffering various mental and physical disorders, which disqualified them from their extraordinarily sensitive occupation.

As is the case with any patient, some air traffic controllers found to be disabled by Dr. Berger would, from time to time, present him with the necessary proof of claim forms supplied by North American and request that he complete them so they could obtain the benefits for which they were insured. As an accommodation to his patients, Dr. Berger recorded on the forms the previously determined diagnosis. Dr. Berger was never paid by North American to arrive at a diagnosis for any of his patients. Indeed, it is undisputed that Dr. Berger was never paid by North American for anything, nor was he ever employed by the company at any time. The present lawsuit is an outgrowth of this factual background.

Suit was filed on January 25, 1977, in the United States District Court for the Northern District of Georgia, Atlanta Division. Jurisdiction was based on diversity of citizenship of all parties under 28 U.S.C. § 1332. Defendants included the present petitioner, Dr. Merton B. Berger, and twelve of his patients, all of whom had come to him for treatment without any involvement by North American in the physician selection

process. None of these air traffic controller defendants filed a cross action against Dr. Berger, clearly indicating their satisfaction with his care.

Respondent North American's complaint asserted that the diagnosis and subsequent representations of disability made by Dr. Berger to it on its forms were negligently made and that, as a proximate result, it was led to make substantial disability payments to its insureds. No privity between Dr. Berger and North American was alleged. The essence of the negligence claim against Dr. Berger is found in paragraph 29 of the complaint, wherein it is urged that Dr. Berger was under a duty "... to exercise reasonable care and prudence of the kind customarily exercised by psychiatrists in this community when rendering opinions as to the total and permanent disability of their patients, and Berger failed to so act ...". The complaint also asserted a fraud action against Dr. Berger, but this issue is not on appeal.

On April 6, 1977, after obtaining an extension of time in which to answer, petitioner Berger filed a timely Answer denying all allegations of negligence and/or fraud.

On February 12, 1979, Dr. Berger filed his motion for summary judgment on both the negligence and fraud aspects of the case. The motion was based upon Dr. Berger's affidavit demonstrating that he had never been an employee of North American, had not been hired by it to perform any diagnosis or other service and had no privity of any kind with North American. Dr. Berger's affidavit also established that in expressing opinions as to the mental status of his patients on North American's forms, he was doing so only as an accommodation to his patients. On the issue now before this Court, Dr. Berger contended that, since there was no privity between himself and the insurance company of his private patients, there could be no breach of any duty on his part, and, thus, there could be no malpractice suit against him by the insurance company.

On June 25, 1979, the trial court granted Dr. Berger's motion for summary judgment as to the negligence claim and denied the motion as to fraud. In doing so, the trial judge relied upon an admission made by North American that there was no privity between the parties; he also specifically noted "... a longstanding [Georgia] philosophy against extending religence in professional matters ...." (Opinion of June 25, 1979, p. 5c, *infra*).

On July 9, 1979, North American filed a motion for reconsideration of the grant of summary judgment. It was denied and, on September 19, 1979, final judgment was entered in favor of Dr. Berger on the negligence claim.

North American appealed this decision and, on June 18, 1981, a three judge panel of the United States Court of Appeals for the Fifth Circuit decided in a two to one decision to reverse the trial court.

Petitioner promptly moved for an en banc rehearing and/or, in the alternative, moved for certification of the issue to the Georgia Supreme Court. The motion was denied on August 10, 1981. Petitioner timely made a motion for stay of mandate pending further appeal, which stay was granted on September 3, 1981.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT RENDERED A DECISION IN CONFLICT WITH ITSELF AND OTHER FEDERAL COURTS IN RULING THAT A PHYSICIAN CAN BE SUED FOR MALPRACTICE BY THE INSURANCE CARRIER OF HIS PATIENT WHEN THE COMPANY, BUT NOT THE PATIENT, FELT THE DOCTOR'S DIAGNOSIS WAS INCORRECT.

The first reason why the petition for a writ of certiorari should be granted is that the decision of the Fifth Circuit herein

is in conflict with both prior Fifth Circuit precedent and earlier decisions of other Federal courts.

In *McFarling* v. *Azar*, 519 F. 2d 1075 (5th Cir. 1975), the Fifth Circuit was confronted with a coverage question under a physician's professional liability insurance policy. The doctor was employed by a life insurance company and had examined an applicant for a life insurance policy at its request; he thereafter submitted a fraudulent report to the company. In reaching the ultimate issue, the Fifth Circuit found it necessary to consider the following question:

> "Does the duty, the breach of which is defined as malpractice, run to a life insurance company which pays a doctor to make on its behalf a single examination of an applicant for insurance." *McFarling*, at 1076-1077.

The Fifth Circuit cited as controlling a Florida case, *Greenwald* v. *Grayson*, 189 So.2d 204 (Fla. App. 1966), wherein a married couple employed a doctor to examine a child whose adoption they were contemplating. The doctor failed to discover a physical problem in the child; the couple, which adopted the child in reliance upon the examination, later discovered the problem and sued both in contract and in tort. The trial court directed a verdict on behalf of the physician on the negligence question, and the Florida appellate court approved. The court held that, in the absence of physician-patient relationship, there could be no claim for malpractice.

Applying this rule, the Fifth Circuit held:

> "As did the parents in *Greenwald*, the life insurance company here employed a doctor to advise it on the medical condition of a third-party. Whatever claims it may have against this doctor for the intentional misperformance of his duties on its behalf, they are not the kind of claims Florida recognizes as malpractice." (*Id.* at 1077).

Based on the absence of the physician-patient relationship, the Fifth Circuit, therefore, ruled that the physician could not be liable for malpractice to the insurance company. Put

another way, *McFarling* is compelling authority for the proposition that no malpractice claim exists on behalf of an insurance company against a physician who it employed to make an examination of a third-party. Certainly this rule must apply more strongly in the instant case where North American admittedly never employed Dr. Berger to do anything.

Comparably, other Federal courts have held that a physician's duty to his patient does not create a duty to a third-party non-patient. Such decisions rest on both the law relative to physicians and on analogies from cases involving other professionals. *Soto* v. *Frankford Hospital,* 478 F. Supp. 1134 (E. D. Pa. 1979); *Nortek, Inc.* v. *Alexander Grant and Co.,* 532 F. 2d 1013 (5th Cir. 1976), cert. denied 429 U. S. 1042, 97 S. Ct. 742, 50 L.Ed.2d 754 (1977); *Stephens Industries, Inc.* v. *Haskins & Sells,* 438 F. 2d 357 (10th Cir. 1971).

For this reason, this Court is petitioned to grant certiorari in order to resolve the conflict created by the Fifth Circuit both with earlier precedent and with the law in other Federal jurisdictions.

II. THE FIFTH CIRCUIT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY NOT CERTIFYING THE CASE TO THE GEORGIA SUPREME COURT IN THE ABSENCE OF AUTHORITATIVE STATE DECISIONAL LAW.

The second reason why this petition for a writ of certiorari should be granted is that the Fifth Circuit failed to certify the within matter to the Supreme Court of Georgia.

The issue at bar is who may sue a physician for medical negligence. Under the applicable rules of *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1199 (1938) a Federal court must look for Georgia decisions discussing the necessity for a physician-patient relationship as a prerequisite to a malpractice suit. Such decisions would, or should, determine the outcome of Dr. Berger's case in the Fifth Circuit.

The sole Georgia case on point is *Buttersworth* v. *Swint*, 53 Ga. App. 602, 186 S. E. 770 (1936). There an action was filed against a Dr. Swint asserting negligence in treatment. The plaintiff contended that she was an employee of the Milledgeville State Sanitarium of which Dr. Swint was superintendent. Plaintiff contended that defendant was liable to her because he had been advised of her health problem and negligently failed to render proper and necessary attention. Defendant filed a general demurrer, which was granted. On appeal, the Court of Appeals of Georgia sustained the trial court:

> "The obvious defect in the petition is that it fails to show the relationship of the physician and patient existed between the plaintiff and the defendant; and on the other hand it contains direct allegations which show that the defendant never agreed to treat or advise her as *her* physician." (*Id.* at 772, italics supplied by the Court.)

Georgia courts have often impliedly held that, in order for an action to lie for malpractice, the physician must have undertaken the treatment of the plaintiff. *Mattair* v. *St. Joseph's Hospital, Inc.*, 141 Ga. App. 597, 234 S.E.2d 537, S.E.2d *affirmed* 239 Ga. 674, 238 S.E.2d 366 (1977). Georgia cases concerning other professionals (i.e. accountants and lawyers) have held that there must be a direct relationship between the plaintiff and the defendant in order for the plaintiff to sue for malpractice. *Howard* v. *Dun & Bradstreet, Inc.*, 136 Ga. App. 221, 220 S.E.2d 702 (1975); *MacNerland* v. *Barnes*, 129 Ga. App. 367, 199 S.E.2d 564 (1973); *Hughes* v. *Malone*, 146 Ga. App. 341, 247 S.E.2d 107 (1978).

Georgia courts also have a consistent record of restricting the legal exposure of physicians. The Georgia malpractice statute of limitations (Ga. Laws 1976, pp. 1363-1365; Ga. Code Ann. § 3-1101, *et seq.*) requires that an action must be brought against a physician within two years of an alleged act or omission. This statute has been held to mean exactly what it says regardless of when the patient discovers or should have discovered the injury. *Dalbey* v. *Banks*, 245 Ga. 162, 264 S. E. 2d 4 (1980). The so-called Doctrine of Informed Consent has

been rejected by the Georgia courts. *Young* v. *Yarn*, 136 Ga. App. 737, 222 S.E.2d 113 (1976). The Doctrine of Res Ispa Loquitur does not apply in malpractice suits against Georgia physicians. *Hayes* v. *Brown*, 108 Ga. App. 360, 133 S.E.2d 102 (1963); *Branch* v. *Anderson*, 47 Ga. App. 858, 171 S.E. 771 (1933).

The Fifth Circuit certainly possessed persuasive indications that a Georgia court, *given an opportunity*, would hold that a physician could not be sued for medical negligence by a non-patient. Ignoring this authority, the Fifth Circuit chose to rely on reasoning by analogy in an unpublished Federal case dealing with architects' liability. *Alexander Hamilton Life Insurance Co.* v. *Trust Company Bank* (Civil Action No. C76-893A, N.D.Ga. 1979). This was error.

At the very least, the Fifth Circuit should have utilized the available Georgia certification statute, Ga. Code Ann. § 24-3902 and Supreme Court Rule 36 to send this vital question to the Georgia Supreme Court for definitive resolution. It has done so in the recent past on matters of much less importance. *Hollowell* v. *Jove*, 628 F.2d 513 (5th Cir. 1980).

Such a decision would have been in accord with usual Federal practice and custom.

Concerning the importance of certification, Professor Moore has noted:

> "There has been much expression in favor of the device of certification by the federal courts of an unsettled question of state law to the highest court of that state to get a definitive answer . . . In two cases, *Clay v. Sun Insurance Office, Ltd.* 363 U.S. 207, 80 S.Ct. 1222, 4 L.Ed.2d 1170 (1960) and *Lehman Brothers v. Scheir*, 416 U.S. 386, 94 S.Ct. 1741, 40 L.Ed.2d 215 (1974), the Supreme Court has expressed its wholehearted approval of certification." 1A. Moore's *Federal Practice* ¶ 0.309[3], pp. 3131, 3132. See also, *Aldrich* v. *Aldrich*, 375 U. S. 249, 84 S. Ct. 305, 11 L.Ed.2d 304 (1963); *In re McClintock*, 558 F.2d 732 (5th Cir. 1977); *United States Life Insurance Company* v. *Delaney*, 328 F. 2d 483 (5th Cir. 1964); *Wansor* v. *George Hantscho Company*, 570 F. 2d 1202, (5th Cir. 1978).

In conclusion, petitioner agrees with Judge Clark, in his able dissent in the present matter:

> "(W)hen our certification rule permits Georgia's highest court to settle the issue, I look with disfavor upon establishing a precedent for Georgia Federal Courts in a diversity case when it is obvious the decision will spawn many progeny." *North American Company for Life & Health Insurance v. Berger,* at 8135 (attached hereto at Appendix A).

III. CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER, AS A MATTER OF PUBLIC POLICY, A PHYSICIAN CAN BE LIABLE TO HIS PATIENT'S INSUROR IN THE ABSENCE OF ANY RELATIONSHIP BETWEEN THE DOCTOR AND THE COMPANY.

The third reason why this Petition for Writ of Certiorari should be granted is that it presents a question of paramount and overriding importance to the nation as a whole.

The Fifth Circuit has created a duty where none heretofore existed. It has expanded the physician's proper concern from an exclusive dedication to the welfare of his patient to include a concern for the satisfaction of the patient's insurance company. This decision has far ranging implications for both the medical and insurance professions, and, more importantly, for all Americans who from time to time consult physicians.

By imposing such duty on the physician, the Fifth Circuit correspondingly creates a right of action for breach of that duty. This right will foster innumerable and very real conflicts in the health care delivery system. Who is the doctor to satisfy in attempting to exercise a reasonable degree of care—the patient, or the cost conscious insurance company? Who will compensate the physician for the extra risk he now evidently runs of a negligence suit by the insurance company? By what right does an insurance company even obtain leave to label the care rendered to its insureds as malpractice when (as here) the patients make no such claim?

Indeed, The Fifth Circuit has created for North American, and all insurance companies, greater rights than those afforded to family members of patients or other individuals who legitimately depend upon patients. The businessman whose key employee is injured as a result of malpractice has no right to sue the physician, despite the real and demonstrable damages suffered as a consequence of the physician's neglect. *Cox* v. *Stratton,* 352 N.Y.S. 2d 834 (1974). The child whose father is crippled by negligence of a physician has no claim against him for malpractice; this is true, in Georgia at least, no matter how great the child's emotional or financial loss. Yet, under the within decision, the insurance company may sue to collect all benefits it feels were improperly paid, even if the patient makes no claim of having received substandard care.

It would be possible to spin out scenarios illustrating the evils of this precedent at some length.[1] It is to prevent just such abuses that innumerable cases, from all jurisdictions, have rejected the very thing done by the Fifth Circuit.

In *Chatman* v. *Millis,* 257 Ark. 451, 157 S.W.2d 504 (1975), Mrs. Chatman had been divorced from her husband, plaintiff in the lawsuit. Under the terms of the divorce, Mrs. Chatman had custody of their young son, with whom the husband had visitation privileges. The wife suspected that her ex-husband was subjecting the boy to homosexual conduct and, to aid in terminating the visitation privileges, took the child to

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[1] Consider, for example, a not uncommon occurrence: A physician performs a vasectomy which is, for whatever reason, unsuccessful. The patient's wife becomes pregnant but, in the interval, the attitude of the couple has changed and they are delighted by this unexpected addition to their family. They harbor no ill will against the physician and return to him for further care. They make no claim against the physician for malpractice.

The patient's insurance company, however, is subsequently presented a bill for maternity costs which it would not have incurred had the vasectomy been successful. Under the Fifth Circuit ruling, does not the insuror have a right to sue for malpractice?

defendant Dr. Millis, a psychologist. Dr. Millis examined the child and wrote a letter to Mrs. Chatman's attorney advising that it would be in the child's best interest to have the father's visitation rights restricted. Evidencing knowledge that this letter might be relied upon by a judicial officer, the psychologist wrote that he would be willing to state his opinions in court. Mr. Chatman then sued Dr. Millis for both defamation and malpractice.

In the course of hearing special venue defenses the trial court held that Arkansas recognized no action for malpractice against a psychologist, and that even if such action existed, there could be no action for malpractice under the facts of the case since there was no doctor-patient relationship between the parties.

On appeal, the Supreme Court of Arkansas approved, holding that the allegations of plaintiff's complaint could not state a cause of action. The court added:

> "We do not flatly state that a cause for malpractice must be predicated upon a contractual agreement between a doctor (psychologist) and a patient, but we do say that a doctor-patient relationship must exist, i.e., there must be a duty, *as a doctor,* owed from the practitioner to the patient . . . Concisely stated, we simply reiterate that under the facts alleged, appellee [Dr. Millis] owed no duty, *as a doctor,* to appellant, and this duty must be in existence before appellant can recover because of negligence, constituting malpractice." (*Id.* at 506, italics added by the court).

In *Rogers* v. *Horvath,* 65 Mich. App. 644, 237 N.W.2d 595 (1976), the Court construed the question before it as follows:

> "The principal question raised by this appeal is whether a professional physician-patient relationship is a legal prerequisite to basing a cause of action in professional malpractice against a physician. . . . The term 'malpractice' denotes a breach of duty owed by one in rendering professional services to a person who has contracted for such services; in physician-malpractice cases, the duty

owed by the physician arises from the physician-patient relationship. No such relationship existed in the case at bar. Defendant was employed by General Motors to examine one of its employees in preparation for a workmen's compensation hearing. Plaintiff did not employ the defendant, nor did she seek to receive medical advice or treatment. Under the circumstances, the defendant did not owe plaintiff any duty arising from a physician-patient relationship. This is not to say that a physician who examines a person for reasons other than diagnosis or treatment and for the benefit of someone other than the examinee owes no duty of due care to that person. Rather, we hold that the physician in such a case does not owe such a duty of care as will subject him to liability for malpractice." (*Id.* at 596-597).

In *Johnston* v. *Sibley*, 558 S.W.2d 135 (Tex. App. 1977) the Texas Court of Appeals held:

"It is well established principle of law that a physician is liable for malpractice for negligence only where there is a physician-patient relationship as a result of a contract, express or implied, that the doctor will treat the patient with proper professional skill, and there is a breach of professional duty to the patient." (*Id.* at 137).

The same result was reached in *Keene* v. *Wiggins*, 69 Cal. App. 3d 308, 138 Cal. Rpt. 3 (1977):

"It is well established by authorities that in other states [that] the physician is liable for malpractice or negligence only where there is a relationship of physician-patient as a result of a contract, express or implied, that the doctor will treat the patient with proper professional skill and there is a breach of professional duty to the patient . . . Here we find no physician-patient relationship, express or implied, of the sort giving rise to a duty of care owed to [the claimant] in connection with the report. The uncontradicted declarations assert [the claimant] went to [the doctor's] office at the request of the carrier for examination. [The claimant] was present because he was required to submit to examination as a claimant. There is no assertion [the doctor] did anything more than examine

> [the claimant] and make his report to Industrial Indemnity as he was hired to do. . . . [W]e must affirm the holding of the trial court that on the basis of the declarations, [the doctor] owed the claimant no duty of professional skill in connection with the report. [The doctor's] alleged failure to advise [the claimant] of some medical condition did not give rise to a cause of action under the circumstances of this case. Summary judgment was properly granted." (*Id.* at 6, 8-9).

Respondent's counsel has been quoted as stating that there never has been a ruling by any court in the United States similar to the one at bar. (See "Psychiatrist Facing Trial in Controller-Stress Suit", *The Atlanta Journal-The Atlanta Constitution.* Saturday, August 29, 1981, pp. 1 and 6A). This is true. It is respectfully submitted that before any such decision affects both the medical and insurance professions, and the public they serve, the nation's highest court must examine the issue.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully requests a Writ of Certiorari be granted and that the holding of the Court below be reversed. In the alternative, this Court is requested to exercise it's discretion and certify this issue to the Supreme Court of Georgia.

Respectfully submitted,

SIDNEY F. WHEELER
Attorney for Petitioner

Of Counsel:

LONG, WEINBERG, ANSLEY & WHEELER
2500 The Equitable Building
100 Peachtree Street, N.W.
Atlanta, Georgia 30303
(404) 688-7900

CERTIFICATE OF SERVICE

I, Sidney F. Wheeler, attorney for petitioner Merton S. Berger, M.D., and a member of the bar of the Supreme Court of the United States, hereby certify that on the 2nd day of October, 1981, I have served three true copies of the foregoing Petition for a Writ of Certiorari upon the respondent and all parties, by depositing in a United States Mailbox the required number of true copies of said petition, with first class postage pre-paid, correctly addressed to the counsel of record at their post office address, as required by Supreme Court Rule No. 28.

MATTHEW H. PATTON, ESQ.
EVERETTE L. DOFFERMYRE, ESQ.
KILPATRICK & CODY
3100 The Equitable Building
100 Peachtree Street, N.W.
Atlanta, Georgia 30303

JOHN A. DUNAWAY, ESQ.
EUGENE HOPE, ESQ.
DUNAWAY, HAAS, BROOME, HOPE & BRIDGES
2964 Peachtree Road, N.E.
Suite 440
Atlanta, Georgia 30305

C. JAMES JESSEE, JR., ESQ.
GEORGE E. DUNCAN, JR., ESQ.
BARRY L. ROSEMAN, ESQ.
620 Northside Tower
6065 Roswell Road, N.E.
Atlanta Georgia

This 2nd day of October, 1981.

LONG, WEINBERG, ANSLEY
& WHEELER

/S/ SIDNEY F. WHEELER

Sidney F. Wheeler

2500 The Equitable Building
100 Peachtree Street, N.W.
Atlanta, Georgia 30303
(404) 688-7900

Sworn to and Subscribed Before
Me This lst Day of October, 1981

/S/ HARRY D. GREEN, JR.

Notary Public, Clarke County, Georgia
My Commission Expires July 19, 1982

Appendix A

NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE,
Plaintiff-Appellant,

v.

Merton B. BERGER et al., Defendants,

Merton B. Berger, Defendant-Appellee.

No. 79-3541.

United States Court of Appeals,
Fifth Circuit.
Unit B

June 18, 1981.

Before THOMAS A. CLARK and KRAVITCH, Circuit Judges, and LYNNE,* District Judge.

LYNNE, District Judge:

This appeal focuses on the age-old requirement of privity of contract between the parties in an action for the negligent performance of a duty. Appellee Berger was a practicing psychiatrist in the Atlanta area from 1968 through 1977. In his capacity as psychiatric consultant to the Federal Aviation Administration he diagnosed as totally disabled approximately 154 air traffic controllers. The basis for these diagnoses was often job-related anxiety and depressive neurosis. A number of these air traffic controllers held disability income insurance policies issued by appellant North American. Berger certified his findings to North American on the appellant's claim forms after the initial determination and periodically thereafter. North American relied on these certifications in paying the claims of various air traffic controllers. Because of the large number of claims, North American investigated Berger and concluded that many of his diagnoses of total disability were

* Senior District Judge of the Northern District of Alabama, sitting by designation.

incorrect. It sued Berger to recover the disability benefits paid to the air traffic controllers because of his allegedly fraudulent or negligent diagnoses.

Appellant's claim against Berger for fraud is pending in the District Court. Appellant appeals from the District Court's granting of a summary judgment in Berger's favor on the negligence count and its subsequent refusal to reconsider the issue. The District Court ruled that because North American was not in privity with Dr. Berger, it could not sue him to recover for the results of his alleged negligence. Upon examination of the record and the forces motivating the privity requirement, we disagree and reverse.

The appellee claims that the District Court rightly dismissed the negligence count of North American's compliant because a doctor is not subject to malpractice liability unless the injured party is or was the doctor's patient. *Buttersworth v. Swint*, 53 Ga.App. 602, 186 S.E. 770 (1936).[1] In support of its position, appellee relies not only on cases concerning medical malpractice, but on those charging other professionals with acts of negligence. *Howard v. Dun & Bradstreet, Inc.*, 136 Ga.App. 221,220 S.E.2d 702 (1975); *McNerland v. Barnes*, 129 Ga.App. 368, 199 S.E.2d 564 (1973); *Smith v. International Lawyers*, 35 Ga.App. 158,132 S.E. 245 (1926). In each of these cases, Georgia courts explicitly or implicitly refused to hold the defendant professional liable because there was no direct relationship between the injured party and the defendant.

Both *Howard* and *McNerland* concern the liability of financial experts for incorrect financial assessments of businesses in which the plaintiff subsequently invested. The *McNerland*

[1] Appellant argues that because of its peculiar facts, *Buttersworth* fails to establish a sweeping privity requirement for malpractice actions. In *Buttersworth*, the superintendent of a state hospital made the offhand statement that the physical condition of one of his employees could be corrected "if she would wear an abdominal support." 53 Ga.App. at 604, 186 S.E. at 772. The employee was not his patient; he never examined her. The case is distinguishable from the instant situation because of the nature of the opinions rendered in each case. Dr. Swint made a casual remark. Dr. Berger filled out and signed appellant's certification forms with the intent for appellant to rely on his opinion.

court relied on *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931), in which Judge Cardozo refused to hold an accountant liable for a negligently prepared financial statement because it would expose him "to a liability in an indeterminate amount for an indeterminate time to an indeterminate class." 174 N.E. at 444.[2] The court in *Howard* was even more protective of the defendant. It noted:

> [A]s to third parties, even those the accountant knew or should have known were relying on his audit, liability can be found only upon fraudulent conduct, and proof of mere negligence will not suffice.

220 S.E.2d at 704.

The court insulated accountants from liability to anyone except those in privity.

In support of its requirement of privity in suits against professionals for negligence, *McNerland* cited *Smith v. International Lawyers*, 35 Ga.App. 158, 132 S.E. 245 (1926). The *Smith* court refused to hold an attorney liable for negligence to anyone but his client. The appellant distinguishes *Smith* on the grounds that its privity requirement applied only to money-rule procedures under Section 4954 of the *Georgia Civil Code* (1910). *McNerland*, however, cited *Smith* for its privity theme and apparently overlooked the money-rule limitation.

While recognizing that a professional may not be held liable to an "indeterminate class" of third parties, the appellant contends that an exception to the general privity requirement applies in this case. When a "tortfeasor provides an opinion with actual or reasonable knowledge that the injured party will rely on its accuracy,"[3] he is liable for the foreseeable results.

---

[2] In numerous opinions prior and subsequent to *Ultramares*, the New York courts recognized that the purpose of the privity requirement was to protect an alleged tortfeasor from liability to a nameless, unforeseen class of plaintiffs. *Mallis* v. *Bankers Trust Co.*, 615 F.2d 68,82 (2d Cir. 1980); *White* v. *Guarente*, 43 N.Y.2d 356,361, 401 N.Y.S.2d 474, 477,372 N.E.2d 315, 318 (1977). *See Glanzer* v. *Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922).

[3] *North American Company for Life and Health Ins.* v. *Berger*, No. C-77-119-A (N.D. Ga., June 25, 1979) (order granting summary judgment).

The appellant successfully distinguishes *McNerland* and *Howard*, the accountant cases, from its own. In *McNerland*, the faulty financial statements contained specific disclaimers which should have put the plaintiff on notice that the statements had not been audited by an independent CPA. In holding for the defendant, the court emphasized the latter facts in conjunction with lack of privity. In *Howard*, the defendant Dun & Bradstreet never made a representation to the plaintiff with the knowledge that he would rely upon it. Dr. Berger certainly had no doubt as to whom he was making a representation and for what purpose.

In sharp contrast to *McNerland* and *Howard*, appellant cites *Alexander Hamilton Life Insurance Company v. Trust Co. Bank*, No. C76–893–A (N.D. Ga., July 29, 1979), in which the absence of privity failed to insulate an architect from liability to an insurance company. As a preface to its opinion, the court stated: "Although there are still many unsettled questions as to the situations in which a party not in privity of contract may sue for negligence, it is clear that in a large and increasing number of instances such suits are allowed." *Id.* At 9.[4] The architect in *Alexander Hamilton* erroneously certified to an insurance company the completion of a hotel. In reliance on the architect's certification, the insurance company purchased a construction loan from the construction lender. Upon default by the borrower, the insurance company foreclosed and sued the architect. The architect relied on *McNerland* and *Howard*, emphasizing the similar lack of privity in his own case. In response, the court cited *Bodin v. Gill*, 216 Ga. 467, 117 S.E.2d

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[4] The court in *Alexander Hamilton* emphasized that the decision to allow a person not in privity with the defendant to sue was largely a policy matter. In *United States* v. *Rogers & Rogers*, 161 F.Supp. 132, 135 (S.D.Cal.1958), the court listed various factors which should play a part in the decision:

> "the extent to which the transaction was intended to affect the plaintiff, the foreseeability of the harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." (citations omitted)

Alexander Hamilton at 10.

325 (1960), in which an architect's design of a church caused water damage to the property of a neighboring landowner. In spite of the absence of privity, the landowner recovered for the architect's negligence.[5] The Supreme Court of Georgia recognized in *Bodin* that:

> [T]he law imposes upon persons performing architectural, engineering, and other professional and skilled services an obligation to exercise a reasonable degree of care, skill and ability, which generally is taken and considered to be such a degree of care and skill as, under the circumstances, is ordinarily employed by their respective professions.

Id. at 472, 117 S.E.2d at 330.

The court thus identified a legal duty of care independent of privity.

[1,2] The factual similarities between *Alexander Hamilton* and the instant case are striking. The plaintiffs are both insurance companies that relied on certifications made by professionals before they took certain financial action. In *Alexander Hamilton*, the architect certified completion directly to the plaintiff. In the instant case, Berger, using the plaintiff's forms, certified disability directly to the insurance company. The relationship approaches that of privity.[6] At the very least,

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[5] Two other significant Georgia cases rely upon *Bodin*. In *Covil v. Robert & Co. Assocs.*, 112 Ga.App. 163, 144 S.E.2d 450 (1965), the court allowed landowners to maintain an action against an architectural and engineering firm that designed a nearby water pumping station that caused plaintiffs' property to flood. In *Dresco Mech. Contrs. Inc. v. Todd—CEA*, 531 F.2d 1292 (5th Cir. 1976), although the plaintiff did not prevail on the merits of the case, the court applied Georgia law and found that the defendant engineer owed a duty imposed by law to a co-defendant manufacturer with whom he was not in privity. The manufacturer had filed a third-party complaint against the engineer, accusing him of negligently designing a heating plant which the manufacturer was under contract to build.

[6] Appellant argues that doctors qualify as "other professionals" under the *Bodin* rationale, especially in light of Ga.Code § 84-924, which states:

(footnote continues)

the relationship was so close that Berger knew exactly who would rely on his certification and for what purpose.[7]

Berger was under a duty to exercise reasonable care in performing medical services, making diagnoses, and transmitting them to appellant. Summary judgment on the issue of negligence was improper for this reason, and because it is apparent that genuine issues of fact remain to be resolved. Our resolution of the issue of privity makes a consideration of appellant's third-party-beneficiary agreement unnecessary.

(footnote continued)

> A person professing to practice surgery or the administering of medicine for compensation must bring to the exercise of his profession a reasonable degree of care and skill. Any injury resulting from a want of such care and skill shall be a tort for which a recovery may be had.

Appellant emphasizes the language "any injury" in the statute. While appellant's reading of the statute, *i.e.*, that it confers a right to sue for monetary injury upon a third party, is rather ingenious, it is not persuasive. More compelling is appellee's analysis of the statute's history. Its first codification was in 1863 under the article entitled "Physical Injury." It is possible, however, to read the "other professionals" language in *Bodin* to include doctors without resorting to the Georgia statute.

[7] Appellant cites Section 552 of the Restatement (Second) of Torts as further support for the argument that Dr. Berger had a duty to North American. That section states:

> (1) One who, in the course of his business, profession, or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> > (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
> >
> > (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

(footnote continues)

REVERSED AND REMANDED.

THOMAS A. CLARK, Circuit Judge, dissenting:

In dissenting I have two non-reasons and two reasons. The non-reasons are the lack of precedent and my view that we should certify this case to the Supreme Court of Georgia. A decision can be made without the aid of precedent when there is none. However, when our certification rule permits Georgia's highest court to settle the issue, I look with disfavor upon establishing a precedent for Georgia federal courts in a diversity case when it is obvious that the decision will spawn many progeny.

The two reasons for dissenting are: (1) the complaint does not seek the relief granted by the decision and opinion of the majority; and, (2) the law of negligence and the relationship of the parties give no basis in reason or logic for imposing this liability on a doctor.

Turning to the complaint, it is my conclusion that in its complaint the appellant failed to state a claim against Dr. Berger for simple negligence or medical malpractice. If anything, North American's complaint states a claim against Dr. Berger for the intentional tort of fraudulent misrepresentation. North American in its complaint alleges that Dr. Berger is a psychiatrist who disagreed with the FAA's treatment of its air traffic controllers and their emotional problems. He is charged with conspiring with the controllers to cause them to fail to report for work on the basis of a nervous condition and then diagnose them as disabled because of their working conditions and resulting nevousness. The complaint goes on to allege that Dr. Berger's wife is a lawyer with an office next to Dr. Berger's. She is said to handle some of the legal problems of the air traffic controllers, including their claims for workmen's compensation and private insurance disability benefits. One comes

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(footnote continued)

The facts of this case fit very neatly into this section of the Restatement. Appellee points out, however, that every illustration following the section concerns commercial transactions. Appellant retorts that the filling out of insurance disability forms and the payment of insurance proceeds are commercial transactions. We agree with appellant.

away from the complaint with the reaction that North American is accusing Dr. Berger of having a feud with the FAA and profiting from his fees charged the air traffic controllers. The complaint supports a claim for fraud, for intentional misrepresentation, for gross negligence—it does not support a claim for simple negligence. At no place in the complaint is there a count averring simple negligence in the manner suggested by Form 9 in Appendix attached to the Federal Rules of Civil Procedure. The appeal does not come to us on a motion to dismiss, but on the district court's grant of Dr. Berger's motion for summary judgment on the issue of his negligence vel non vis a vis North American. Intuitively, one realizes that this motion was advanced by Berger's malpractice insurance carrier so its role in the litigation could be determined. Since I find that neither the allegations nor the affidavits against Berger establish a claim for simple negligence, I would affirm.

Even if the allegations were sufficient, I would affirm. The majority relies primarily on Georgia cases which hold architects liable to third parties. Of course, it is logical to hold architects liabile for injury to the public or an adjoining landowner when such injury is the direct result of negligent design by the architect of a structure. That is simple tort law of one party owing reasonable care to another party and extending privity to those who foreseeably might be injured if such care is not taken.

The majority opinion permits every doctor to become potentially liable for payments made by an insurance company to its policy holder, the doctor's patient, whenever, the doctor completes a form describing the patient's condition, and the doctor has made a mistake in diagnosing the condition. This act of the doctor is done at the request of the company and is done without consideration. The majority opinion imposes a duty on doctors neither foreseeable nor contemplated by the parties or their relationship.

Insurance companies insure persons against such risks as death and disability. It is common knowledge that they pay doctors to conduct examinations when issuing such policies.

The policies, in case of a disability claim, require the policyholder to submit to an examination at the request of the company by a doctor hired by the company. Obviously, if a doctor employed by an insurance company misses a diagnosis which results in unwarranted liability of the company, the doctor may be liable to the company for his negligent performance of the contract.

The majority opinion creates privity without any just cause or reason. In the disability policy the insured individual authorizes the insurance company to secure information from any doctor treating him or her in the event of a claim for disability. The company, upon receiving a claim, conducts an investigation of the alleged disability by sending a medical form to doctors treating the claimant, as Berger in this case, by writing the policyholder's employer, by conducting surveillance, by interviewing neighbors, and by seeking other relevant information. Anyone furnishing information to the company does so gratuitously for the purpose of assisting the company in its assessment of the claim for disability benefits. None of these persons, including a doctor, such as Berger here, is required to cooperate. Most doctors do accommodate their patients by giving the insurance company the same information furnished the patient.

The doctor has a duty to the patient to make a correct diagnosis of his illness, if he has one. Doctors, being human, sometimes err. When they do, they are legally liable to the patient for any damages sustained by the patient as the result of the negligence. The employment contract and the relationship create the duty to be careful.

Here our court creates a potential financial liability when there is no contract and no relationship other than a gratuitous one, when the doctor, at the request of the company, puts in writing information about the patient's condition as he sees it.[1] If the doctor knowingly furnishes false information, he may be

[1] Does the majority opinion permit a disability insurance company to recover from the claimant's employer or neighbor who furnishes erroneous information supportive of the claim but negligently arrived at?

held liable. If one lies to another, knowing the other will act to his detriment based on the lie, responsibility for such an intentional misrepresentation under certain circumstances may ensue. Furnishing information derived through error, innocently and gratuitiously, does not create such a responsibility. Thus, I dissent.

Appendix B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT
UNIT B

No. 79-3541

NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE,
Plaintiff-Appellant,

versus

MERTON B. BERGER, ET AL.,
Defendants,
MERTON B. BERGER,
Defendant-Appellee.

Filed August 10, 1981

Appeal From the United States District Court for the Northern District of Georgia

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion June 18, 1981, 5 Cir., 198 , ____F.2d____).

(August 10, 1981)

Before KRAVITCH and THOMAS A. CLARK, Circuit Judges, and LYNNE*, District Judge.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

PHYLLIS KRAVITCH
United States Circuit Judge

* U.S. District Judge from the Northern District of Alabama, sitting by designation.

United States District Court
Northern District of Georgia
Atlanta Division

NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE

versus

MERTON B. BERGER, *et al*

Civil Action File No. C77-119A

ORDER

(Filed June 25, 1979)

Presently pending in the above styled action are the motions of the defendants, Sidney B. Warner and Merton B. Berger, for summary judgment.

Warner's motion is based entirely on a clause of the underlying insurance contract which reads:

> 2. Incontestable: (a) After this policy has been in force for a period of two years during the lifetime of the Insured (excluding any period during which the Insured is disabled), it shall become incontestable as to the statements contained in the application.
>
> (b) No claim for loss incurred or disability (as defined in the policy) commencing after two years from the date of issue of this policy shall be reduced or denied on the ground that a disease or physical condition not excluded from coverage by name or specific description effective on the date of loss had existed prior to the effective date of coverage of this policy.

Subparagraph 2(b)'s language can be interpreted in two ways. First, it could be construed to create, as a prerequisite to

incontestability, a requirement that the insured's disability did not, in fact, "commence" until two years after the date of the issuance of the policy. However, this would make the clause meaningless because such a reading would always permit the insurer to attempt to prove that the disability's commencement predated the second anniversary of the policy and perhaps the date of the policy's issue as well. If the insurer could prove that disability began before the second anniversary then Subparagraph 2(b) would allow proof of the disability's onset before the date of issue.

The alternative construction interprets Subparagraph 2(b) as rendering incontestable on the ground of pre-issue onset any claim by the insured for disability supposedly occurring after the second anniversary. Thus, any time an insured, such as Warner, claimed that disability commenced after the second year, the insurer would automatically be precluded from trying to prove that disability began before the policy's date of issue. In effect the policy states that if the insurer cannot or does not ascertain within the first two years that the insured is disabled then it is forever barred from trying to prove that the disability in fact preceded the policy's issurance. This reasoning comports with the Georgia courts' philosophy concerning the purpose of incontestability clauses. See *Penn Mutual Life Insurance Co. v. Childs,* 65 Ga. App. 468, 476-77 (1941).

Even so, the plaintiff is not precluded from showing, for the purpose of avoiding incontestability under Subparagraph 2(a), that disability commenced after the date of the policy. Subparagraph 2(a) is not inconsistent with itself under this interpretation because the proof of post-issue disability affects only the time limitations of the clause and is not necessarily related to the ground of incontestability, namely, statements contained in the application. Consequently, the plaintiff is entitled to prove that Warner was disabled after the date of the policy's issue but only for the purpose of showing that the policy was not in force for two full years excluding periods of disability. To the extent the plaintiff proves pre-claim disability precluding the policy from having been "in force" for two years

within the meaning of the incontestability clause, the insurer may also attempt to prove that statements contained in the application voided the insurer's contractual obligations.

Disability prior to the date of the policy might be relevant to showing disability thereafter since the jury may infer that a mental condition once started may continue. However, because of Subparagraph 2(b) the plaintiff may not offer evidence of pre-issue disability solely for the purpose of voiding the policy. Instead, pre-issue disability is only relevant to the question of tolling the two-year period in Subparagraph 2(a) and, even then, the plaintiff must also establish that Warner was aware of the incorrectness of statements made in the application.

Warner asserts in his sworn affidavit that he was not disabled from September 13, 1973, the date of the policy, until after its second anniversary. The plaintiff argues that such a statement is insufficient to prove lack of disability but cites no authority for this proposition. To the contrary, it must be concluded that a person is normally one of the best sources of information as to the state of his mental health at particular times. Neither side maintains that Warner has ever been so disabled as to not be capable of recognizing his problem. Therefore, his own assertion of lack of disability until after the policy's second anniversary is a sufficient basis for requiring the plaintiff to demonstrate the contrary.

The plaintiff has attempted to do so. However, Exhibits 1 and 3 attached to the plaintiff's response under Rule 91.72, Local Rules for the Northern District of Georgia, are useless in that the copies are illegible. Exhibits 4 and 5 contain nothing indicating disability prior to September 13, 1975. Finally, Exhibit 6 is relevant to the fraud issue and has no conceivable relation to actual disability before the second anniversary unless the plaintiff is contending that Warner's illness manifested itself in attempts to defraud insurance companies.

According to the plaintiff, Exhibit 2 indicates that on February 25, 1974 Warner admitted to symptoms which he claimed at his deposition were demonstrative of his disability.

But Warner's deposition has not been filed. Whether there is evidence of disability prior to September 13, 1975 must await supplementation of the record by the plaintiff.

Berger's motion for summary judgment involves the plaintiff's claims of malpractice and fraud. He urges that no action for negligent performance of medical practice can be brought except by the patient or one who is in privity with the doctor. The plaintiff in this case had not contractual relationship with Berger.

Howard v. Dun & Bradstreet, Inc., 136 Ga. App. 221 (1975), held that a financial reporting firm could not be liable to someone not in privity with it for negligently advising that a particular business was solvent when the reverse was true. In view of the longstanding philosophy against extending negligence in professional matters on which the Court of Appeals relied, there appears no good reason why the *Howard* ruling should not apply to the medical profession as well.

The plaintiff responds that there is an exception to the requirement of privity when the alleged tortfeasor provides an opinion with the actual or reasonable knowledge that the injured party will rely on its accuracy. However, *Howard* rejected even this extension of negligence liability:

> [A]s to third parties, even those who the accountant knew or should have known were relying on his audit, liability can be found only upon fraudulent conduct, and proof of mere negligence will not suffice.

Id. at 223. The factual recitation in the opinion does not specify whether Dun & Bradstreet was actually aware of Howard's potential reliance on its report but apparently this point was irrelevant for even in such a case no claim for negligence could be stated. It seems clear that the Georgia courts are not willing to loosen the privity requirement even when, as here, the defendant's knowledge of the plaintiff's reliance can be shown.

The plaintiff also claims that Ga. Code Ann. §84-924, which reads:

> [a] person professing to practice surgery or the administering of medicine for compensation must bring to the exercise of his profession a reasonable degree of care and skill. *Any injury* resulting from a want of such care and skill shall be a tort for which a recovery may be had[.] [emphasis added]

provides for medical malpractice claims by nonpatient third parties because of the emphasized language. Insofar as can be determined, this statute has never been interpreted by a Georgia appellate court in the context presented in Berger's motion. In the absence of any authority to the contrary and on the basis of the statute's language this court will construe Section 84-924 as being essentially neutral on the question of who may be a party as distinguished from what types of injury may be compensated. As the plaintiff concedes, "any injury" refers to those injuries which are proximately caused by the tort. There can be little doubt that, given its version of the facts, the plaintiff's loss was a result of Berger's alleged negligence. Nevertheless, the same was true in *Howard* and the Georgia court, apparently for policy reasons, precluded liability to a third party not in privity of contract. Who may recover is distinctly different from the type of injuries for which recovery may be had and only the latter question is answered by Section 84-294.

Although the plaintiff had no physician-patient or contractual relationship with Berger it may still institute an action for fraud against him. *Howard v. Dun & Bradstreet, supra,* at 223. Berger first insists that the complaint fails to plead fraud with specificity as required by Rule 9(b), Fed.R.Civ.P. This contention has been previously rejected. Order of July 14, 1977 at 9.

Next, Berger asserts that the plaintiff's cause of action is based solely on his opinions of the air traffic controllers' disability and that an opinion cannot suggest a suit alleging fraud. Normally opinions cannot provide the basis for fraud but there is a well-established exception as outlined by Professor Prosser:

> [I]t has been recognized very often that the expression of an opinion may carry with it an implied assertion, not only that the speaker knows no facts which would preclude such an opinion, but that he does know facts which justify it. There is quite general agreement that such an assertion is to be implied where the defendant holds himself out or is understood as having special knowledge of the matter which is not available to the plaintiff, so that his opinion becomes in effect an assertion summarizing his knowledge. Thus the ordinary man is free to deal in reliance upon the opinion of an expert jeweler as to the value of a diamond, of an attorney upon a point of law, of a physician upon a matter of health, of a banker upon the validity of a signature, or the owner of land at a distance as to its worth, even though the opinion is that of his antagonist in a bargaining transaction. On the same basis it has been held that statements by a seller as to the capacity of the thing sold, or the condition of land, or other matters, which on the part of one without special knowledge would be regarded as mere opinion, may be relied on as statements of fact. [footnotes omitted].

W. Prosser, *Handbook of the Law of Torts*, §109 at 726-27 (4th ed. 1971). Apparently this rule was the implied reason for the decision in *Daugert v. Holland Furnace Co.*, 107 Ga. App. 566, 570 (1963), where an allegation of a false opinion based on facts known to be untrue by a defendant holding himself out as an expert created a cause of action. Similarly, the plaintiff here had a right to rely on Berger's professional medical opinion and may recover if it can show that he knowingly misrepresented the health of the air traffic controllers. The cases cited by Berger with one exception[1] involved opinions by a seller as to the quality of goods for sale, a situation not present here.

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[1] Judge Lawrence expressly refrained from premising his decision in United States ex rel. MevA Corp. v. Northeast Construction Co. of West Virginia, 298 F.Supp. 1135 (S.D. Ga. 1969), on the opinion rule. Id. at 1139.

Finally, whether the plaintiff exercised reasonable diligence in discovering the fraud is a question for the jury. See *Pan American Petroleum Corp. v. Orr*, 319 F.2d 612 (5th Cir. 1963); see also *Braselton Bros. v. Better Maid Dairy Products, Inc.*, 222 Ga. 472 (1966).

Accordingly, Warner's motion for summary judgment is granted in part and consideration is deferred in part. To the extent the complaint asserts a claim on the premise that Warner's disability preexisted the date of the policy's issue it is dismissed. The plaintiff is directed to file a copy of the transcript of Warner's deposition within fifteen (15) days of the filing of this order. The clerk shall resubmit Warner's motion at that time. Berger's motion for summary judgment is granted in part and denied in part. To the extent the complaint alleges a claim for negligence in rendering professional services it is dismissed.

So ordered this the 23 day of June, 1979.

/s/ ALBERT HENDERSON, JR.

Judge, United States District
Court for the Northern
District of Georgia

Appendix D

United States District Court for the Northern District of Georgia Atlanta Division

NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE

vs.

MERTON B. BERGER, M.D., *et al.*

Civil Action No. C-77-119-A

ORDER

(filed August 28, 1979)

The case is presently before the court on the plainiff's motion for oral argument and reconsideration of this court's order of June 25, 1979, and also on the court's deferred ruling on defendant Warner's motion for summary judgment.

In the June 25 order, this court dismissed the plaintiff's negligence claim against Dr. Berger, holding that a suit for negligent performance of medical practice cannot be brought by anyone except the patient or one who is in privity with the doctor. The plaintiff, despite its earlier assertions that Berger "had no contractual or physician-patient relationship with North American," now seeks to have the court find that North American was a third-party beneficiary of the agreement between Berger and Warner to furnish opinions to North American regarding Warner's disability. This argument was raised for the first time by the plaintiff in its motion for reconsideration.

The plaintiff has failed to show that Berger and Warner intended to benefit North American by agreeing to furnish Berger's opinions to North American. *See Continental Casualty Co. v. Continental Rent-A-Car of Georgia, Inc.*, 349 F.Supp. 666 (N.D. Ga. 1972). This court adheres to its former ruling that the holding in *Howard v. Dun & Bradstreet, Inc.*, 136 Ga. App. 221 (1975) should apply to the medical profession and

finds no privity. The plaintiff's motion for reconsideration insofar as it relates to the portion of the June 25 order dismissing the plaintiff's claim of medical negligence is DENIED.

The court hereby GRANTS the motion for oral argument, specifically limiting argument to the issue of the incontestability of Part V, Para. 2, Sub. Para. (b) in the insurance policy.

Counsel should also be prepared to argue the merits of that portion of Warner's motion for summary judgment on which a ruling was deferred in this court's June 25 order.

Oral argument will be before the court in chambers on September 5, 1979 at 2:00 p.m., and will be limited to thirty minutes per side.

SO ORDERED, this 27th day of August, 1979.

/s/ _____

Robert L. Vining, Jr.
United States District Judge

Appendix E

The Atlanta Journal
THE ATLANTA CONSTITUTION

VOL. 32, NO. 26 • • • P.O. BOX 4689
ATLANTA, GA. 30302, SATURDAY, AUGUST 29, 1981

Psychiatrist Facing Trial In Controller-Stress Suit

By Sam Hopkins
Constitution Staff Writer

A federal appellate court, in what is thought to be a landmark decision, has ruled that a psychiatrist may be liable to a third party for allegedly negligent diagnosis and certification of his patients.

The case involves an insurance company which sued psychiatrist Merton B. Berger and 12 air traffic controllers in Atlanta, claiming that Berger had made fraudulent or negligent diagnoses of the controllers relating to alleged job-related anxiety and depressive neurosis.

U.S. District Judge Robert L. Vining Jr. earlier had issued a summary judgment dismissing the negligence allegations in the case, but he retained the fraud allegations.

The 5th U.S. Circuit Court of Appeals reversed Vining's ruling, which now means that both the negligence and fraud allegations will have to be decided by a trial jury.

The suit has been pending since the North American Company for Life and Health Insurance first filed the action on Jan. 25, 1977.

The Illinois-based insurance company is seeking judgments of $562,025 against Berger and a total of $179,025 against the 12 air traffic controllers. Berger, a former Atlanta-area resident, later moved to Del Mar, Calif.

The 5th Circuit decision notes that Berger, in his capacity as psychiatric consultant to the Federal Aviation Administration, "diagnosed as totally disabled approximately 154 air traffic controllers."

The basis for the diagnoses was often job-related anxiety and depressive neurosis. A number of the air traffic controllers held disability income insurance policies issued by the North American company.

The court noted that North American had relied on Berger's certification of the controllers' alleged disability in paying claims of the FAA employees.

"Because of the large number of claims," the appellate court said, "North American investigated Berger and concluded that many of his diagnoses of total disability were incorrect . . . .

"It sued Berger to recover the disability benefits paid to the air traffic controllers because of his allegedly fraudulent or negligent diagnoses."

The court further noted, in reversing Vining's ruling, that Berger had claimed the district judge rightly dismissed the negligence count "because a doctor is not subject to malpractice liability unless the injured party is or was the doctor's patient."

Matthew H. Patton of Atlanta, who represents North American, said his firm and other law firms over the country had researched the third-party negligence aspect of the case and could not find a court ruling similar to the 5th Circuit's.

The $562,025 judgment sought against Berger includes the $179,025 disability payments paid to the 12 other defendants and $383,000 paid to 17 other air traffic controllers who are not named as defendants.

The 5th Circuit has denied Berger's motion for a rehearing on its reversal decision.

Patton said that since the suit was first filed more than four years ago, the insurance company and 11 of the 12 air traffic controllers have reached out-of-court settlements.

The original suit contends that Berger used inadequate procedures to certify the alleged neuroses, supposedly caused by the pressures on the air traffic controllers as they work in radar rooms to monitor the incoming and outgoing airline passenger planes to prevent them from colliding.

Opposition

Office - Supreme Court
FILED
NOV 6 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81-640

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MERTON B. BERGER, M.D.,

Petitioner,

vs.

NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit,

RESPONDENT'S BRIEF IN OPPOSITION

Matthew H. Patton
Kilpatrick & Cody
3100 Equitable Building
100 Peachtree Street
Atlanta, Georgia 30043
(404) 572-6500
Attorney for Respondent

QUESTIONS PRESENTED

The questions presented by the Petition are more properly stated as follows:

1. Should the Supreme Court grant certiorari to review a court of appeals' decision, issued in a purely diversity action, interpreting and applying Georgia law with regard to a negligence claim, the resolution of which was dependent upon the unusual facts alleged in the complaint?

2. Where neither party sought an order certifying the questions presented to the Georgia Supreme Court, did the court of appeals abuse its discretion in deciding the issue presented? Did the court of appeals err in refusing to grant petitioner's motion to certify the questions presented to the Georgia Supreme Court, when the motion was not filed until thirteen days *after* the court of appeals had entered its decision?

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vs.

NORTH AMERICAN COMPANY FOR
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Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, North American Company for Life and Health Insurance, respectfully requests that this Court deny the Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit, rendered June 18, 1981, is now published at 648 F.2d 305 (1981).

STATEMENT OF THE CASE

On January 15, 1977, respondent, North American Company for Life and Health Insurance ("North American"), filed a complaint for damages in the United States District Court for the Northern District of Georgia against petitioner, Merton B. Berger ("Berger"). Also named as defendants were twelve air traffic controllers to whom North American had paid disability insurance benefits in reliance upon certifications of their disability made to North American by Berger. The complaint alleged, among other things, that Berger had either negligently or fraudulently certified to North American the alleged disability of the twelve defendant air traffic controllers as well as seventeen other air traffic controllers who held disability income policies issued by North American.

The only claims still pending in the case are North American's claim against one of the air traffic controllers (and his counterclaim against North American) and North American's claim against Berger. This appeal concerns only the latter and arises from the Fifth Circuit's reversal of summary judgment entered against North American with respect to its negligence claim against Berger.

The facts before the court below may be briefly summarized as follows. Berger is a practicing psychiatrist. From January 1, 1968, until he quit his psychiatric practice in Atlanta in December 1977, Berger by his own admission examined and

diagnosed as totally disabled 154 air traffic controllers employed by the Federal Aviation Administration. Over two thirds of these diagnoses were made during the years 1974, 1975, and 1976 and in most cases, Berger found the disability to be permanent and job related.

Among the air traffic controllers whom Berger diagnosed as being totally disabled were the other twelve defendants and certain other air traffic controllers, all of whom held disability income policies issued by North American and most of whom held disability income and credit disability policies with other companies. Berger's determination of total disability was typically based upon a finding of a job-related anxiety and depressive neurosis.

After his initial examination and periodically thereafter, Berger certified to North American that the particular air traffic controller was totally disabled. In each instance the certification by Berger was made solely to North American, was made on North American's claim forms, was made for the purpose of inducing North American to pay the monthly disability benefit to the air traffic controller, and was made with the knowledge that North American would rely thereon in paying the claim.

Relying upon Berger's certification of their disability, North American paid the claims of various air traffic controllers. When the incidence of the claims for air traffic controllers became unusually high, North American conducted an investigation which led North American to conclude that many of the air traffic controllers whom Berger had certified as totally disabled had, in fact, not been disabled. Thereupon, the present action was instituted seeking to recover from Berger, among other things, the disability benefits paid to the air traffic controllers on the basis of his negligent or fraudulent certification.

SUMMARY OF ARGUMENT

The decision below involves an issue of state tort law and is limited to the peculiar facts of this case. Thus, the case has limited precedential value and there are no other special and im-

portant reasons that would merit this Court's review of the court of appeals' decision. Nor is the decision in conflict with any other reported decision.

Furthermore, the court of appeals did not err, as petitioner contends, in deciding the issues itself instead of certifying the matter to the Georgia Supreme Court. Whether to certify a matter depends upon the facts and circumstances of the particular case and that decision is committed to the sound discretion of the court of appeals. Moreover, petitioner should not be heard to complain since he did not move, until after entry of the court of appeals' decision, for certification to the Georgia Supreme Court.

Finally, certiorari should not be granted because the decision below is both correct and fair. It is consistent with Georgia legal precedent and accords with decisions in numerous cases in other states as well as Section 552 of the *RESTATEMENT OF TORTS* (Second).

REASONS FOR DENYING THE PETITION

I.

NO SPECIAL AND IMPORTANT REASONS WARRANT REVIEW ON WRIT OF CERTIORARI.

In his petition Berger argues that this case presents "a question of paramount and overriding importance to the nation as a whole." (Petition, at 12). That is a gross exaggeration, to say the least. The decision below involved an extremely narrow issue of Georgia tort law, *i.e.*, whether a person practicing a profession, in this case psychiatry, can be held liable to an insurance company to whom the psychiatrist made specific certifications with knowledge that the insurance company would rely thereon. The Fifth Circuit, in resolving that issue, limited its holding to the specific facts of the dispute and, thus, the precedential significance of the decision is quite limited.

However, even if the court of appeals' decision is construed

as broadly as Berger suggests, it would not merit certiorari review. The 1980 revision of the Supreme Court Rules deleted allegedly erroneous decisions of state law by a court of appeals from its list of considerations for granting a writ of certiorari. Thus rarely, if ever, would interpretations of state law, even if arguably erroneous, be a sufficient ground for the grant of a writ. This is especially true where the decision below was limited to the peculiar facts of the controversy.

II.

THE DECISION BELOW IS NOT IN CONFLICT WITH ANY REPORTED DECISIONS

Petitioner's first stated ground for granting the writ is "that the decision of the Fifth Circuit herein is in conflict with both prior Fifth Circuit precedent and earlier decisions of the federal courts." (Petition, at 7, 8.) That is not the case and, frankly, it is difficult to understand petitioner's reasoning.

As evidence of the alleged "conflict," petitioner cites *MCFARLING V. AZAR*, 519 F.2d 1075 (5th Cir. 1975). Aside from the obvious distinctions between that case and the case *sub judice*,[1] Berger's argument misconceives the essential nature of the federal system, a necessary consequence of which is that the statutes and decisions of one state will often conflict with that of another. Thus even if the law of Florida did conflict with the law of Georgia, that would not constitute, in any sense, a "conflict" meriting certiorari review.

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[1] *McFarling v. Azar* did not involve a physician's liability; it involved the issue of his insurer's liability under a professional liability policy covering "malpractice" and "error and mistake" where there was fraud on the part of the physician. The result depended, in part, on Florida's narrow interpretation of malpractice which, by definition in Florida, is an injury to a patient in the context of a physician-patient relationship. North American has never claimed to fall within the Florida definition of "malpractice." Its claim, under Georgia law, is for negligent certification.

III.

THE FIFTH CIRCUIT DID NOT ABUSE ITS DISCRETION IN DECIDING THE ISSUES PRESENTED RATHER THAN CERTIFYING THE MATTER TO THE GEORGIA SUPREME COURT

Berger also contends that the petition "should be granted because the Fifth Circuit failed to certify the within matter to the Supreme Court of Georgia." (Petition, at 9.)

It is well established that the decision of whether to use the certification procedure "rests in the sound discretion of the federal court." *LEHMAN BROTHERS V. SCHEIN*, 416 U.S. 386, 391 (1974). There is no evidence that the Fifth Circuit abused its discretion in electing to hear and decide the issues presented.

Whether an issue is appropriate for certification depends upon its facts and circumstances. In this case there are several reasons why the Fifth Circuit may have decided that certification would not have been appropriate. In the first place, certification is only authorized where there is no controlling precedent. *See* Rule 36, Supreme Court of Georgia. For reasons stated in the court of appeals' opinion and in Section IV, *infra*, at 7, 8, there was, in this case, controlling Georgia precedent. Second, certification is generally most appropriate where there are clean-cut issues of law. This case, with its peculiar facts, would have presented a difficult problem in formulating the issues to be certified. This is particularly true since the case was on appeal from grant of summary judgment, with many facts not yet determined.

Berger's argument regarding certification, taken to its logical conclusion, would require that the Court adopt a rule making certification mandatory whenever a court of appeals is faced with a difficult question of state law. Apart from the practical impossibility of applying such a rule (at what point does a question become too difficult for the federal courts?), this Court has already stated that there is no obligation on the part of the courts of appeals to resort to certification.

Furthermore, while certification is a useful tool in select cases, it should not be used as a means of avoiding every difficult issue of state law. As former Chief Judge Brown, a strong proponent of certification, said: "We use much judgment, restraint and discretion in certifying. We do not abdicate." *BARNES V. ATLANTA & PACIFIC LIFE INS. CO. OF AMERICA*, 514 F.2d 704, 705 (5 th Cir. 1975). The judges of the Fifth Circuit have had by far the most experience with certification, *see* C. Wright, A. Miller & E. Cooper, *FEDERAL PRACTICE AND PROCEDURE*, §4248, p. 530 (1978), and their decision in this case should be respected.

This is especially so where, as here, Berger made no effort to seek certification until *after* the Fifth Circuit had entered its decision. Had Berger felt that certification was appropriate, he should have moved the Fifth Circuit to certify the question before that court had spent considerable time researching, hearing, and deciding the issues. Having failed to do so, Berger should not now be heard to complain that the court of appeals proceeded to decide the issues presented to it.

IV.

THE COURT OF APPEALS GAVE FULL CONSIDERATION TO THE ISSUES PRESENTED AND REACHED THE CORRECT DECISION

The petition presents no significant new authorities or arguments on the issues decided by the Fifth Circuit. Inasmuch as this Court has consistently recognized that circuit courts have more expertise than the Court in applying the laws of the state within their respective circuits, *BUTNER V. UNITED STATES*, 440 U.S. 48 (1979), respondent respectfully urges that the Court defer to the decision of the court of appeals.

However, should the Court review the merits of the case, respondent respectfully submits that it will conclude that the decision below is correct. It is correct, first, because the Georgia Supreme Court has held that a duty, independent of privity, is

imposed upon "persons performing architectural, engineering, and other professional skilled services. . . ." *BODIN V. GILL*, 216 Ga. 467, 117 S.E.2d 325 (1960). Although not specifically named, physicians are clearly among the persons performing such "other professional and skilled services" and, therefore, Berger owed a duty to North American even if privity was lacking.

The decision below is correct for the additional reason that the relationship between Berger and North American, under the peculiar facts, is so close to privity, if not privity itself, as to give rise to a legal duty. Writing for the majority, Judge Lynne paraphrased Judge Cardozo's opinion in *GLANZER V. SHEPARD*, 233 N.Y. 236, 135 N.E. 275 (1922) – the famous "bean weigher" case that is the seminal decision on the tort law negligent misrepresentation. Judge Lynne stated:

> In the instant case, Berger, using the plaintiff's forms, certified disability directly to the insurance company. The relationship approaches that of privity. At the very least, the relationship was so close that Berger knew exactly who would rely on his certification and for what purpose. Berger was under a duty to exercise reasonable care in performing medical services, making diagnoses, and transmitting them to appellant.

648 F.2d. at 308

The decision below is not only correct but fair. It accords with Section 552 of the *RESTATEMENT OF TORTS* (Second) (titled "Information negligently supplied for the guidance of others"), and numerous other decisions involving negligent misrepresentation. The decision also accords with the common sense of the matter. Berger had no obligation to make any certification to North American but once he elected to do so, knowing that North American would rely thereon, Berger was obliged to act with reasonable care. As Judge Cardozo said in *GLANZER V. SHEPARD, supra*, "it is ancient learning that one who assumes to act, even through gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all." 135 N.E at 276.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted

Matthew H. Patton
Kilpatrick & Cody
3100 Equitable Building
100 Peachtree Street
Atlanta, Georgia 30303
(404) 572-6500